U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 21Sep2001

IN THE MATTER OF:

MARVIN PROFFITT
Claimant,

v. Case No.: 2001-BLA-00170

FALCON COAL CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: Joseph E. Wolfe, Esq.
For the Claimant

W. Barry Lewis, Esq.
For the Employer

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

DECISION AND ORDER AWARDING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations thereunder at 20 C.F.R. Parts 718[1] and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

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[1] Citation to the regulations at 20 C.F.R. Part 718 shall constitute reference to the amended regulations unless otherwise noted.

This claim was referred for a formal hearing to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs ("Director" or "OWCP") in accordance with the provisions of the Act and the regulations issued thereunder. After due notice a hearing was held in Abingdon, Virginia, on April 3, 2001. Claimant and Falcon Coal Company ("employer") were represented by counsel.

At the hearing the record was left open for the submission of evidence by the employer in response to evidence submitted by the Claimant less than 20 days prior to the hearing. Accordingly the following evidence has been received and will be made part of the record:

1) EX 3 - X-ray readings by Dr. Bob Gayler of x-rays dated January 13, 2001 and July 16, 2000.

2) EX 4 - X-ray readings by Dr. William W. Scott of x-rays dated January 13, 2001 and July 16, 2000.

3) EX 5 - X-ray readings by Dr. Paul S. Wheeler of x-rays dated January 13, 2001 and July 16, 2000.

4) EX 6 - Medical report of Dr. James R. Castle dated July 12, 2001 and his curriculum vitae.

5) EX 7 - X-ray readings by Drs. Wheeler, Scott and Gayler of x-ray dated December 12, 2000.

Based on the entire record, the following is entered.

Findings of Fact

1. Claimant is Marvin Proffitt, an individual whose address of residence is P.O. Box 113, Doran, Virginia 24612.

2. Employer is Falcon Coal Company, a business entity whose address is P.O. Box 1234, Grundy, Virginia 24614.

3. Claimant worked as a coal miner as that term is defined by Section 402 (d) of the Act and 20 C.F.R. §725.202 for 18 years.

4. Claimant was employed for several underground coal mine employers between 1974 and 1996. Falcon Coal Company was the last coal mine employer for whom the claimant was employed for a cumulative period of one year. Claimant was employed for this company between 1987 and 1991. Claimant testified that he operated a continuous miner.

5. Subsequent to his employment with Falcon Coal Company Claimant worked for CC Mining Inc. in 1992 and C&O Mining Inc. in 1996. According to Social Security records and Claimant's testimony his employment with each of these companies did not consist of a cumulative year of coal mine employment.

6. All of Claimant's coal mine employment was underground. He testified that he generally worked at the face and operated a continuous miner. During his last months of coal mine employment for C&O Mining Inc., he shoveled coal on a beltline and also maintained the beltline.

7. Claimant testified that he smoked cigarettes beginning at age 25 at the rate of approximately 1/2 pack of cigarettes per day. However, he testified that he quit smoking about 13 years ago in 1988.

8. Claimant also testified that he had heart attacks in 1988 and 1996. He did not return to work after his second heart attack. He also takes medication for diabetes.

9. Claimant testified that his daily activity is limited by his shortness of breath and he indicated that he would not be able to return to his coal mine employment because of his breathing problems.

10. Claimant has one dependent for purposes of augmentation of benefits, his wife, Patricia.

11. The following are readings of chest x-rays taken of the claimant:

Physician	**X-ray Date**	**Reading Date**	**Quality**	**Qualifi-cations**	**Impression**
Forehand	2/2/00	2/2/00	1	B	1/0 s,t 4 zones
Navani	2/2/00	2/18/00	2	B, BCR	1/1 p,t 6 zones
Scott	2/2/00	6/19/00	3	B, BCR	Negative for pneumoconiosis
Wheeler	2/2/00	6/19/00	2	B, BCR	Negative for pneumoconiosis
Gayler	2/2/00	6/19/00	3	B, BCR	Negative
Branscomb	2/2/00	10/20/00	1		2/2 p,s 6 zones
Fino	6/28/00	7/13/00	1	B	1/1, q,q

Gayler	7/6/00	6/20/01	2	B,BCR	Negative for pneumoconiosis
Scott	7/6/00	6/20/01	3	B,BCR	Negative for pneumoconiosis
Wheeler	7/6/00	6/21/01	2	B,BCR	Negative for pneumoconiosis
Patel	12/12/00	12/14/00	2	B,BCR	1/1 p,p 6 zones
Scott	12/12/00	7/19/01	2	B,BCR	Negative for pneumoconiosis
Gayler	12/12/00	7/19/01	2	B,BCR	Negative
Wheeler	12/12/00	7/21/01	2	B,BCR	Negative for pneumoconiosis
DePonte	1/13/01	1/30/01	1	B,BCR	1/2 p,q 6 zones
Gayler	1/13/01	6/20/01	3	B,BCR	0/1 q,q 4 zones
Scott	1/13/01	6/20/01	2	B,BCR	Negative
Wheeler	1/13/01	6/21/01	2	B,BCR	Negative for pneumoconiosis
Castle	5/14/01	7/12/01	1	B	1/1 q,t 6 zones

* B - B-reader
BCR - Board-certified Radiologist

12. The following are results of pulmonary function tests administered to claimant:

Physician/ Date	**FEV1**	**MVV**	**FVC**	**Age/ Hgt**	**Co-op Comp**	**Tracings**

Forehand/	2.09	70	2.99	51/	Good	Yes
2/2/00	1.89*	93*	2.92*	67"	Good	
Fino/	1.95	86	3.41	51/	Good	Yes
6/28/00	1.93*	99*	3.48*	66"		
Rasmussen/	1.82	102	3.77	52/	N/I	Yes
12/12/00	1.93*	106*	3.64*	66"		
Castle/	1.70	81	2.82	52/	N/I	Yes
5/14/01	1.71*	–	2.82*	67"		

* Results post-bronchodilator

13. The following are results of blood gas studies administered to claimant:

Date	**Doctor**	**PCO2**	**PO2**
2/2/00	Forehand	28 27*	51 65*
6/28/00	Fino	32.9	61.5
12/12/00	Rasmussen	36	56
5/14/01	Castle	36.6	64.2

* Results after exercise

14. The following physicians reported on claimant's condition:

(a) J. Randolph Forehand, M.D. examined claimant at the request of the Department of Labor on February 2, 2000. He diagnosed coal workers' pneumoconiosis and chronic bronchitis. Pulmonary function testing revealed an obstructive ventilatory pattern which he attributed to claimant's coal dust exposure and his history of cigarette smoking. He concluded that claimant was totally disabled due to his significant respiratory impairment which he attributed to a combination of his coal workers' pneumoconiosis and his chronic bronchitis.

(b) Gregory J. Fino, M.D. examined claimant on June 28, 2000. He diagnosed simple coal workers' pneumoconiosis, emphysema and chronic bronchitis. He noted a moderate obstructive impairment on pulmonary function testing and concluded that claimant was totally disabled. He indicated that claimant's respiratory impairment was due to his history of cigarette smoking and found that coal dust exposure was not a contributor.

(c) D.L. Rasmussen, M.D. performed a pulmonary evaluation of the claimant on December 12, 2000. He diagnosed coal workers' pneumoconiosis with moderate loss of lung function based on ventilatory studies. He found that coal mine employment and cigarette smoking were both risk factors, noting that coal mine dust is a significant contributing factor in claimant's totally disabling impairment.

(d) Ben Branscomb, M.D. provided a consultative report based on his review of medical records as indicated in his report dated January 1, 2001. He read claimant's chest x-ray as 2/2 with p and s type opacities. In his report and deposition, however, he indicated that the x-ray changes were due to technical factors and possibly claimant's obesity rather than coal workers' pneumoconiosis. He concluded based on his review of records that claimant did have a totally disabling respiratory impairment which he attributed to cigarettes and obesity.

(e) James R. Castle, M.D. examined claimant on May 14, 2001. He diagnosed coal workers' pneumoconiosis based on a chest x-ray, as well as chronic obstructive airways disease, mild moderate airway obstruction, coronary artery disease, peripheral vascular disease, diabetes and obesity. He concluded that claimant had permanent and total respiratory disability due to tobacco smoke induced chronic obstructive airway disease.

Procedural History and Case Background

1. The miner filed a claim for benefits on January 14, 2000 *Dx*. 1.

2. On September 18,2000, the district director issued a determination of eligibility. *Dx*. 35.

3. Employer controverted Claimant's entitlement to benefits and requested a hearing by letter dated October 2, 2000. *Dx*. 36.

4. The claim was referred to this Office for hearing and adjudication on November 17, 2000. *Dx*. 40.

5. On February 15, 2001, in compliance with the U.S. District Court's February 6, 2001 *Preliminary Injunction Order* in *National Mining Ass'n. v. Elaine L. Chao*, the undersigned issued a *Post-Hearing Order* directing the parties to state whether the amended regulations would affect the outcome of this claim. However, in *National Mining Ass'n et al v. Chao*, , Civil Action No. 00-3086 (D. D.C. 2001), District

Judge Emmet Sullivan dissolved his *Preliminary Injunction Order* which required a stay of all black lung cases wherein the amended regulations could affect the outcome. The court concluded that the amended regulations were valid and upheld their application.

Issues Presented for Adjudication

The contested issues as stated on the CM-1025 and which were confirmed at the hearing in this case are: (1) whether the miner suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) whether the miner is totally disabled; and (4) whether his total disability is caused by pneumoconiosis. *Dx*. 41, Tr. 6. Because this claim was filed in January of 2000, it is governed by the regulations at 20 C.F.R. Part 718.[2]

In regard to the issue of length of coal mine employment Claimant alleges 23 years while the employer has stipulated to 17 years. Tr. 6. .The record includes the social security earnings record, as well as claimant's testimony which clarifies which of claimant's former employers were coal mine employers. Relying on the Social Security earnings record, I have credited claimant with coal mine employment between 1974 and 1996 where his coal mine employment earnings were at least fifty dollars per quarter. Applying this method it is determined that claimant was employed as a coal miner for eighteen years.

Existence of Pneumoconiosis and its Etiology

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
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> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition cause by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis,

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[2] As the miner last engaged in coal mine employment in the Commonwealth of Virginia, appellate jurisdiction of this matter lies with the Fourth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

> silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201. Moreover, the regulations at 20 C.F.R. § 718.203(b) provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).[3]

Section 718.202(a)(1) provides that the presence of pneumoconiosis may be established by x-ray. Pursuant to the criteria of Section 718.102, to establish the existence of pneumoconiosis, an x-ray must be read to show Category 1, 2, 3, A, B, or C, according to the ILO-U/C International Classification of Radiographs. The regulation at 20 C.F.R. § 718.202(a)(1) also requires that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[4] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a

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[3] The presumptions contained at §§ 718.304 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

[4] A"B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association.

physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, greater weight may be accorded the x-ray interpretation of a dually-qualified physician (B-reader and board-certified radiologist) over a physician who is only a B-reader. *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

The chest roentgenogram evidence has previously been summarized. There are nineteen readings of seven different x-rays to consider. Seven of these readings were interpreted as positive according to the ILO classification system while twelve interpretations were negative. However, Dr. Branscomb, who initially interpreted claimant's x-ray as positive with a profusion of 2/2, later indicated in deposition testimony that his interpretation was not consistent with pneumoconiosis. He attributed the x-ray changes to technical factors. Since Dr. Branscomb was not a B-reader at the time he interpreted this x-ray, I give his opinion less weight than the other more qualified physicians who performed x-ray interpretations.

All of the six remaining positive interpretations were performed by highly qualified B-readers, three of whom were also Board Certified radiologists. Further, the positive interpretations were performed by six different B-readers and they also include the only reading of the most recent x-ray which was taken on May 14, 2001. The twelve negative interpretations represent readings by only three different physicians who each reread four of claimant's x-rays. I find it significant that six B-readers interpreted claimant's x-rays as positive while only three found the x-rays which they read to be negative. Also, since pneumoconiosis is a progressive disease I give greater weight to the more recent x-ray evidence. In this case the only reading of the most recent x-ray taken on May 14, 2001 was a positive interpretation by a B-reader. For these reasons it is determined that claimant has proven the existence of pneumoconiosis by x-ray evidence.

Section 718.203 provides that for a claimant to be found eligible for benefits, it must be determined that the miner's pneumoconiosis arose out of his coal mine employment. Section 718.203(b) provides further that where, as in the instant case, a miner was employed for ten years or more, there shall be a rebuttable presumption that pneumoconiosis arose out of such employment. No physician who diagnosed pneumoconiosis stated that the disease arose out of any cause other than coal dust exposure. Thus, the presumption is not rebutted.

Claimant must also show that pneumoconiosis causes him to be totally disabled. Section 718.204(c) sets forth certain criteria, including pulmonary function tests, blood gas tests, and the reasoned medical opinions of physicians to be used in determining whether a miner is totally disabled.

Subsection 718.204(c)(1) provides that a pulmonary function study may establish total disability if its values are equal to or less than those listed in Appendix B of the Part 718 regulations. Claimant's pulmonary function studies have been set out earlier herein.

For a miner of the claimant's height, which is 66.5 inches (based on an average of reported heights), §718.204(c)(1) requires an FEV1 equal to or less than 1.92 for a 51 year-old-male, decreasing to 1.91 for

a 52 year-old-male. If such an FEV1 is shown, there must be, in addition, an FVC value equal to or below 2.43; or an MVV value equal to or below 77 for a 51 year-old-male decreasing to 2.41 and 76 for a 52 year old male, or a ratio equal to or less than 55 percent, when the results of the FEV1 test are divided by the results of the FVC test.

Of the four pulmonary function studies contained in the record only the December 12, 2000 prebronchodilator study indicates qualifying values. As a preponderance of the pulmonary function study evidence does not indicate qualifying values according to the regulatory guidelines, it is determined that claimant's pulmonary function study evidence does not establish a totally disabling respiratory or pulmonary impairment pursuant to §718.204(c)(1).

Claimant may also demonstrate total disability due to pneumoconiosis based on the results of blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the bloodstream. 20 C.F.R. §718.204(c).

The two studies performed on June 28 2000 and December 12, 2000 indicate qualifying values while the two studies performed on February 2, 2000 and May 14, 2001 are nonqualifying. Although the blood gas evidence is somewhat inconclusive, since the most recent blood gas test is nonqualifying, it is determined that the blood gas test evidence does not establish the claimant's total disability.

Under §718.204(c)(3), total disability may be shown by medical evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. The evidence does not establish that claimant is suffering from cor pulmonale.

Claimant may also show total disability under Section 718.204(c)(4) by the reasoned medical judgment of a physician based on medically acceptable clinical, laboratory and diagnostic techniques. Under this section all relevant probative evidence must be considered, with the burden of proof on the claimant, to establish total disability by a preponderance of the evidence. See Mazgaj v. Valley Camp Coal Co., 9 BLR 1-201 (1986).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). The following medical reports were submitted as evidence in this record:

Dr. J. Randolph Forehand examined Claimant on February 2, 2000. He considered Claimant's occupational and medical histories as well as a smoking history of ½ pack of cigarettes per day for fifteen years ending in 1988. Reported symptoms included wheezing, dyspnea, cough, chest pain and orthopnea. A positive chest x-ray was considered, as well as a pulmonary function study which showed an obstructive ventilatory pattern. A blood gas test which revealed hypoxemia and an EKG were also performed. Dr.

Forehand diagnosed coal workers' pneumoconiosis and chronic bronchitis. He found that a significant respiratory impairment was present and that insufficient residual oxygen transfer capacity remained for Claimant to return to his last coal mining job. He concluded that Claimant was totally and permanently disabled. He also stated that coal workers' pneumoconiosis and chronic bronchitis combined to impair respiratory function with each contributing to Claimant's functional abnormalities.

Dr. Gregory J. Fino, who is Board Certified in Internal Medicine and Pulmonary Diseases, examined Claimant on July 13, 2000. He considered claimant's pertinent history including a smoking history of ½ pack per day for twenty years. Symptoms included shortness of breath, chest pain and daily cough. Decreased breath sounds were noted on physical examination. A chest x-ray was considered which he interpreted as positive for pneumoconiosis with a profusion of 1/1. A pulmonary function study was performed which showed a moderate obstruction with no bronchodilator response. Moderate hypoxia was noted on arterial blood gas testing. Dr. Fino diagnosed simple coal workers' pneumoconiosis, and emphysema and chronic bronchitis due to smoking. He concluded that Claimant was totally disabled from a respiratory standpoint from performing his last coal mine employment. He attributed Claimant's respiratory impairment to Claimant's history of cigarette smoking and concluded that coal mine dust inhalation was not a contributing factor in the Claimant's disability. Dr. Fino testified to these opinions in his deposition which was taken on September 20, 2000.

Dr. D.L. Rasmussen examined Claimant on December 12, 2000. Dr. Rasmussen is Board Certified in Internal Medicine and Forensic Medicine, as well as a senior disability analyst with the American Board of Disability Analysts. He considered Claimant's occupational, medical and smoking histories, as well as reported symptoms of exertional shortness of breath, chronic productive cough, wheezing, and chest pain. He also considered a chest x-ray, which was interpreted as positive, a pulmonary function study, blood gas test and EKG. The pulmonary function study showed moderate, irreversible obstructive ventilatory impairment and the blood gas testing revealed moderate resting hypoxia. Dr. Rasmussen concluded that overall the studies indicated at least a moderate loss of lung function which would render the claimant totally disabled from performing his last coal mine employment. He indicated that the two risk factors for the Claimant's disabling pulmonary impairment were his cigarette smoking and his coal mine dust exposure and that his coal mine dust exposure must be considered a significant contributing factor.

Dr. James R. Castle, who is Board Certified in Internal Medicine and Pulmonary Diseases, performed a pulmonary evaluation of the Claimant on May 14, 2001. He considered Claimant's symptoms of shortness of breath, which has become progressively worse over the last ten years, daily productive cough, and wheezing. Dr. Castle considered Claimant's work and medical histories, as well as a smoking history of ½ pack of cigarettes per day for about fifteen years . Clinical testing included a chest x-ray which he interpreted as positive, as well as a pulmonary function study, blood gas test, and an EKG. Dr. Castle found the pulmonary function study showed mild-moderate airway obstruction without change after bronchodilators and the blood gas study revealed a mild degree of hypoxemia. Dr. Castle's diagnoses included radiographic evidence of coal workers' pneumoconiosis, chronic obstructive airways disease due

to tobacco smoke, mild to moderate airways obstruction, coronary artery disease, peripheral vascular disease, diabetes and obesity. Dr. Castle also reviewed the other available medical evidence. He concluded that Claimant is totally and permanently disabled from a respiratory standpoint. He attributed Claimant's disability to tobacco smoke induced chronic obstructive airway disease.

The record includes the consultative report of Dr. Ben Branscomb based on his review of some limited medical records as indicated in his report of January 9, 2001. Dr. Branscomb indicated the he originally interpreted Claimants' February 2, 2000 x-ray as positive with a profusion of 2/1. However, after reviewing other interpretations, he indicated that Claimant had only minimal x-ray changes resulting from technical factors or minimal lower lobe peripheral scarring of non-occupational origin. He did conclude that Claimant had a totally disabling respiratory impairment resulting from chronic obstructive pulmonary disease caused by cigarette smoking. He also indicated that neither coal dust, nor coal workers' pneumoconiosis, contributed significantly to Claimant's impairment. Dr. Branscomb testified primarily to these opinions in his deposition which was taken on March 6, 2001.

Each of the five physicians who reported on Claimant's pulmonary condition concluded that he suffered from a totally disabling respiratory impairment which would prevent him from returning to his last coal mine employment. In reaching this conclusion each physician pointed to the pulmonary function studies which show an obstructive lung impairment and to some degree the blood gas test results which also showed some abnormalities. Thus the medical opinion evidence clearly establishes Claimant's total disability due to a respiratory impairment. The only issue remaining is whether Claimant's respiratory impairment is caused by pneumoconiosis as defined by the amended regulations. The amended regulations at §718.204(c)(1) state that claimant's total disability will be considered due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory impairment. Pneumoconiosis is a substantially contributing cause if it has a "material" adverse effect on the miner's respiratory or pulmonary condition or materially worsens a totally disabling respiratory or pulmonary impairment.

All four of the examining physicians diagnosed pneumoconiosis. Dr. Branscomb who did not examine Claimant and reviewed only part of the medical evidence originally interpreted Claimant's x-ray as positive. However, after reviewing other x-ray interpretations, he testified during his deposition that the x-ray changes were probably not due to pneumoconiosis but rather were most likely due to technical problems with the x-ray. I find Dr. Branscomb's testimony on this issue to be somewhat equivocal. I give less weight to his opinion regarding the cause of Claimant's total disability because he did not have the opportunity to examine the Claimant, he only reviewed limited records, and his finding that the x-rays do not reveal pneumoconiosis is inconsistent with the preponderance of the evidence of record.

Of the four examining physicians, Dr. Forehand and Dr. Rasmussen concluded that pneumoconiosis contributed to Claimant's totally disabling respiratory disability. Dr. Forehand indicated that coal workers' pneumoconiosis and chronic bronchitis combine to impair Claimant's respiratory function with each contributing to the functional abnormalities. Since Dr. Forehand found that pneumoconiosis contributed to

Claimant's functional abnormalities, this would clearly constitute a material adverse effect as required by the amended regulations. In addition, Dr. Rasmussen also found that cigarette smoking and coal mine dust exposure were risk factors in the Claimant's disabling pulmonary impairment. He concluded that "coal mine dust exposure must be considered a significant contributing factor." The opinions of Dr. Forehand and Dr. Rasmussen support a determination that pneumoconiosis is a substantially contributing cause of Claimant's totally disabling respiratory impairment under the regulations at §718.204(c)(1).

Dr. Castle and Dr. Fino concluded that Claimant's respiratory impairment was caused entirely by his history of cigarette smoking with no contribution from his pneumoconiosis. Claimant testified that he began smoking at age 25 and smoked about ½ pack of cigarettes per day until his first heart attack in 1988 when he quit smoking. Claimant was a credible witness and his testimony is supported by the smoking histories given to each of the examining physicians which range between eight and ten pack years. Both Dr. Fino and Dr. Castle allude to the fact that Claimant was a heavier smoker than indicated by the history given. However, it is determined that a smoking history of eight to ten pack years is supported by the record and the assumption made by Drs. Fino and Castle that Claimant was a heavier smoker has not been established by the record. Thus they appear to base their conclusion that Claimant's totally disabling respiratory impairment is due entirely to cigarette smoking on a questionable smoking history.

Although Dr. Castle and Dr. Fino are Board Certified in pulmonary diseases, I find the credentials of Dr. Rasmussen to be the most impressive based on his expertise in the specific area of black lung disease. He participated on several coal mine health and research advisory committees including one which developed disability standards for the Federal Black Lung program. He also authored many articles relevant to the area of black lung disease and several which are specifically related to the effects of smoking and occupational exposure. For this reason I give his opinion on the question of the cause of Claimant's totally disabling respiratory impairment the greatest weight. Dr. Rasmussen found that cigarette smoking and coal dust exposure both contributed to Claimant's totally disabling respiratory impairment, and that coal mine dust exposure must be considered a significant factor. Dr. Rasmussen's opinion is supported by Claimant's occupational history of eighteen years as an underground coal miner, his smoking history, and the abnormal pulmonary function and blood gas test results. Dr. Rasmussen's opinion is also supported by the opinion of Dr. Forehand who determined that both smoking and coal dust exposure contributed to the functional abnormalities of Claimant's totally disabling respiratory impairment.

Consequently based on the record as a whole the undersigned is more persuaded by the opinions of Dr. Rasmussen and Dr. Forehand which support a determination that pneumoconiosis is a substantial contributing factor to the Claimant's total disability. Accordingly, it is determined that Claimant has proven total disability die to pneumoconiosis arising out of his coal mine employment. Thus, claimant is entitled to benefits.

Date of Entitlement

Claimant is entitled to benefits as of January 1, 2000. Where, as here, the medical evidence does not reveal a date of onset of disability from coal workers' pneumoconiosis, benefits are payable from the first day of the month in which Claimant filed his application for benefits.

Attorney Fees

An application by Claimant's attorney for approval of a fee has not been received and, therefore, no award of attorney's fees for services is made. Thirty days is allowed to Claimant's counsel for the submission of such an application and attention is directed to §725.365 and §725.366 of the regulations. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have ten days following the receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Employer, Falcon Coal Company, is ordered to :

1. Pay to Claimant, Marvin Proffitt, all benefits to which he is entitled under the Act commencing as of January 1, 2000, augmented by reason of his dependent wife, Patricia, and offset by the amount of any state award for disability due to pneumoconiosis.

2. Pay to Claimant all medical and hospitalization benefits to which he is entitled commencing as of January 1, 2000.

3. Reimburse the Secretary of Labor for any payments made to Claimant under the Act, and to deduct such amounts , as appropriate, from the amounts ordered under paragraphs 1 and 2 above.

4. Pay to Clamant, or to the Secretary of Labor, as appropriate, interest from 30 days after the initial determination of eligibility by the Department of Labor, or the date on which benefits payment was due, whichever is later, until the date upon which payment is actually made.

A
Thomas M. Burke
Associate Chief Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.